instead of in fact being for fifteen years. If criticism of decisions could only safely be made by persons who accurately knew the relevant law, who would be protected? There is no suggestion that the law was intentionally mis-stated.

Their Lordships have discussed this case at some length because in one aspect it concerns the liberty of the press which is no more than the liberty of any member of the public to criticise temperately and fairly but freely anyepisode in the administration of justice. They have come to the conclusion that there is no evidence upon which the court could find that the appellant has exceeded this right, or that he acted with untruth or malice, or with the direct object of bringing the administration of justice into disrepute. They are satisfied that the Supreme Court took the course they did with a desire to uphold the dignity and authority of the law as administered in Trinidad; there nevertheless seems to their Lordships to have been a misconception of the doctrine of contempt of court as applied to public criticism. A jurisdiction of a very necessary and useful kind was applied in a case to which it was not properly applicable, and this in the view of their Lordships has resulted in a substantial miscarriage of justice. Acting, therefore, on the principles enumerated in the first part of this judgment as applicable to appeals from convictions for contempt of court, their Lordships will humbly advise His Majesty that this appeal be allowed and that the order of the Supreme Court dated September 5, 1934, be set aside. The respondent must pay the costs here and in the court below.

Solicitors: *Maples, Treedsdale & Co.; Burchells.*

GABRIEL TOGONU BICKERSTETH & ANOR. v. EVAN ADELEYE SHANU

[P.C. (Lords Alness and Maugham and Sir Sidney Rowlatt) January 30, 1936]

[Privy Council Appeal No. 97 of 1933]

Will — Construction — Devise of real estate — Condition precedent or subsequent — Vesting — Presumption.

After making various devises of real estate in favour of the testator's son, a will provides that "these devises shall take effect upon my said son attaining the age of 25 years."

Held: that, upon the true construction of the words "shall take effect," they related to the devises taking effect in possession and were not intended to impose a condition precedent on such devises. The devises must therefore be construed as vesting at the death of the testator's death and subject to divestment if the son should fail to attain the age of 25.

In re Greenwood, [1903] 1 Ch. 749 and *In re Blackwell,* [1926] 1 Ch. 223 relied on.

Duffield v. *Duffield,* 3 Bl. N.S. 260, referred to.

The established rule for the guidance of the Courts in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness. In cases of doubt as to the nature of the condition, the presumption is in favour of treating the condition as subsequent.

PRIVY COUNCIL — Appeal from the Supreme Court of Nigeria.

Henry Johnson for the appellants.

A. T. Topham and *Horace Newman* for the respondent.

[121] The judgment of the Board was delivered by — [121]

Lord Maugham: This is an appeal from a judgment of the Full Court of the Supreme Court of Nigeria in an action in which the appellants were the defendants and the respondent was the plaintiff. One of the appellants is now dead and the appeal has been prosecuted by the surviving defendant. The action was brought by the respondent as devisee of certain properties for an account of the rents collected by the appellants in respect of these properties from the death of the testator until the date when the respondent attained the age of 25 years. The question for the determination of this Board is whether the devise to the respondent by the testator's will be vested at the death of the testator subject to being divested if the respondent did not attain 25 or was contingent on the respondent attaining the age of 25. The full Court, following the judgment of the learned Judge in the Supreme Court of Nigeria, has decided in favour of the former view, and it is not in dispute that if that decision was correct the order for an account of rents collected by the appellants in respect of the real properties in question must stand.

The will is dated 2nd November, 1927. The testator desired, as appears from the instrument, to provide for his wife, a number of collateral relatives, and in particular, for a reputed son, the respondent, and a reputed daughter, Phyllis Alaba Shanu. Two two children on that date were infants. The respondent was aged 12 and did not attain the age of 25 until 1930. The testator possessed a considerable number of freehold pieces of land and houses situate in or near Lagos in the Colony of Nigeria, where he had carried on business as a trader, and he appears also to have possessed personal estate of substantial value. By his will, which is drawn up in clauses in English form, after revoking all previous wills and declaring that to be his last will, he appointed the appellants and one Foresythe (since deceased) to be his executors and trustees. By clause 2 in the will he gave and bequeathed some 21 legacies, and it should be noted that a pecuniary legacy of £400 bequeathed to his daughter Phyllis was to be deposited for her in a Lagos bank, and that the rent of a house known as 65, Campbell Street, Lagos, was to be paid to her during the period of two years immediately following her marriage as pocket money. To his son the respondent the testator gave a legacy of £1,000 to be deposited for him in the same bank "until he attains the age of 25 yaers." It may be observed that this gift was beyond doubt a vested gift though the testator attempted to postpone the enjoyment of it until the respondent should attain the age of 25. By clause 3 the testator devised certain land and houses in trust for his wife for the term of her natural life and from and after her death in trust for his son the respondent and his heirs. By clause 5 he devised another piece of land to his daughter Phyllis and her heirs and then follows the sentence: "This devise shall take effect two years aftr ethe marriage of my said daughter." Clause 6, which is th eclause raising the present question, is in these terms:

"6. I devise unto my son Even Adeleye Shanu and his heirs (a) all that piece of land situate at Oil Mill Street aforesaid together with the house, buildings, and premises erected thereon and known as 'Shanuville', 5 Oil Mill Street; And also (b) all that piece of land situate at Campbell Street aforesaid with the house buildings and premises erected thereon being a portion of the property known as 'Shanu Terrace', 61 and 63 Campbell Street aforesaid; And also (c) all that piece of land situate at Massey Street in the town of Lagos aforesaid together with the house, buildings and premises erected thereon and known as my business place, 39 Massey Street aforesaid; And also (d) all those three pieces of land situate at Massey Street aforesaid opposite to my said business place together with the house, buildings and premises erected thereon and known as 22 Massey Street; And also (e) my piece of land situate at Ebute Metta, a suburb of the town of Lagos aforesaid, together with the house, buildings and premises erected thereon.

These devises shall take effect upon my said son attaining the age of 25 years."

By clause 8 the testator disposes of the residue of his personal estate. The trustees are to stand possessed thereof upon trust to defray the cost of the maintenance and education and of the marriage of his daughter Phyllis and the cost of the maintenance and education of his son (the respondent). By clause 9 he directs that his son shall attend at a certain grammar school till he attains the highest form therein, after which his trustees are to give him a four years' course of further education and every facility to qualify in such trade or profession as his son may show an aptitude for. By clause 10 the testator directs that a cousin, Emanuel Agemo Olajonlu, shall occupy and reside in his house at 39 Massey Street, rnet free until his son (respondent) shall attain the age of 25 years, and that his trustees shall let the shop attached to the said 39, Massey Street, at such rent and subject to such covenants as they shall think fit. The house, 39, Massey Street, is one of the parcels of real estate devised to the testator's son. The will contains no gift of residue of real estate.

The testator died at Lagos on 21st May, 1918. His will was proved in the Supreme Court
[122] [122] of Nigeria on 11th July, 1918. The respondent attained the age of 25 years in March 1930, and thereupon claimed to be entitled to the rents of properties devised to him from the testator's death. The action was tried on 11th May, 1932, before Webber J. The learned Judge on 16th May, 1932, delivered a reserved judgment in favour of the respondent. In his reasons he stated that he had had some difficulty in coming to a conclusion, and he relied on the proposition that in cases of doubt there is always a presumption in favour of early vesting and that it would be presumed that the testator intended the gift to be vested subjected to being divested rather than to remain in suspense. From this judgment the appellants appealed. The appeal was heard in the full Court on 13th March, 1933, before Sir Donald Kingdon C.J., and Berkeley and Lloyd JJ. The judgment of the Court was delivered by the Chief Justice who said that there was a doubt as to the intention of the testator as to the date of the vesting of the property demised. He however thought that the learned Judge in the Court below correctly stated that there was a presumption in favour of the early vesting in a case of doubt, and the appeal was accordingly dismissed. Their Lordships' attention has been called to a passage in 'Theobald on Wills," Edn. 8, p. 642, in which the learned author states that the Court (in this country) does not now lean in favour of early vesting of real estate in considering the true construction of a will, and that the Court now,

gives effect to the intention expressed in the will without any preconception as to what the testator ought to have or has intended, subject only to this: that it may be bound by rules established by the early authorities, though it might not now adopt such rules if the matter were at large.

It seems to their Lordships to be desirable to determine in the first instance whether the passage above cited is or is not correct. It is contrary to the opinions expressed in 'Jarman on Wills,' Edn. 7, Vol. II, p. 1130, in 'Hawkins on Wills' Edn. 2, p. 283, Edn. 3, p. 282, and in *Halsbury's* Laws of England, Vol. 28, p. 798. The passage generally relied upon for the principle in question is taken from the unanimous opinion of the Judges delivered by Best C.J., in *Duffield* v. *Duffield,* 3 Bl. N.S. 260 at p. 331. In the construction of devises of real estate he said:

"The Judges from the earliest times were always inclined to decide, that the estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning that doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

In delivering the opinion Best C.J. stated at p. 330 some of the reasons which had induced the Judges to adopt the rule, and it may be observed that Lord Eldon, who was presiding, expressed his concurrence with the opinion of the Judges. Their Lordships have not been referred to any judgment throwing doubt upon the general validity of the rule, if it may be so described, although in subsequent statements of the Court the doctrine has been laid down in somewhat less emphatic terms, and it may well be that the present view is more accurately expressed in the language used by Lord Warrington, as Warrington L.J., in the case of *In re Blackwell,* [1926] 1 Ch. 223 at pp. 233-234. It should be observed that a similar principle has been formulated in a number of cases in connection with the very similar, if not identical, question whether a condition affecting an estate is to be construed as a precedent or as a subsequent condition. It has been laid down that in cases of doubt the presumption is in favour of treating the condition as subsequent. The authorities will be found referred to in *In re Greenwood,* [1903] 1 Ch. 749. On the whole their Lordships see no reason for doubting that the established rule for the guidance of the Court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with a reasonable clearness.

In the present will the question may be said to depend upon the meaning of the words "shall take effect upon my son attaining the age of 25 years." The words "take effect" in this connection have not apparently been made use of in any will which has come before the Courts and their meaning is untouched by authority. In this case several considerations may

help in their construction. It is not immaterial to note that the devise to the son in clause 6 begins in the form of an absolute gift and that the sentence which occasions the difficulty follows in the form of a separate clause, which, if the appellant's view is correct, must be treated, though it certainly is not wholly free from ambiguity, as cutting down the prior devise. Again, the legacy to the son is to be deposited in a bank until the son attains the age of 25 years and this may be thought to suggest that the object of the testator with regard to his son was not to prevent him having any estate in the real property unless and until he should attain the age of 25 years, but rather to postpone his enjoyment and if possible to prevent him from mis-
[123] applying the property [123] before he was 25. Further, some weight may properly be attached to the consideration that if the appellant is correct and devise is contingent, the rents and profits of the properties in question until the son attained the age of 25 would pass as on an intestacy, with the result that neither of the children described by the testator as his son and daughter would in any circumstances derive any benefit from such rents and profits, a singular result having regard to the fact that the testator has actually directed his trustees to let the shop attached to 39 Massey Street, premises, at such rent and subject to such covenants as they shall think fit. On the other hand no weight can properly be attached to the direction that the cousin Emanuel shall occupy and reside in the house at 39 Massey Street, since this appears to be merely a personal right of occupation and not the gift of an estate. On a consideration of the whole of the will and of the circumstances in which it was made, and applying the rule or principle above referred to in relation to vesting, their Lordships are of opinion that the true construction of the words "shall take effect" is that they relate to the devise taking effect in possession, and are not intended to impose a condition precedent on the devise contained in clause 6 of the will. The devise must therefore be construed as besting at the death of the testator subject to divestment if the respondent should fail to attain the age of 25. They will accordingly humbly advise His Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitors: *Benham, Synnot & Wade; Stoneham & Sons.*

ADIB EL HINNAWI v. YACOUB FAHMI ABU EL HUDA EL FARUQ

[P.C. (Lords Atkin, Alness and Maugham)
February 27, 1936]
[Privy Council Appeal No. 101 of 1933]

Practice — Plea not urged in lower Courts to an issue — Plea held not to be affirmable on appeal Privy Council.

Promissory note — Consideration — Inadequacy of — Insufficiency of plea.

Where it was established that consideration was given for a promissory note, the inadequacy of the consideration afforded no relevant answer to a demand made upon it.

Where it was open to the appellant to have urged a plea of undue influence in the Courts below to an issue, that is to say, to have claimed and obtained a judicial decision upon it, but he omitted to do so;

Held: that it was impossible for the Privy Council to have set aside the judgment appealed against, and to affirm such plea.

PRIVY COUNCIL. — Appeal from the Supreme Court of Palestine.

John Morris and *Arthian Davies* for the appellant.

B. B. Stenham and *Frank Whitworth* for the respondent.

The judgment of the Board was delivered by —

Lord Alness: This is an appeal from a judgment of the Supreme Court of Palestine, dated 5th April, 1932, reversing a judgment of the District Court of Jaffa, dated 9th November, 1931, and entering judgment for the respondent against the appellant for the equivalent in Palestine currency of £E4,000, with interest and costs. The action out of which the appeal arises was begun on 7th February, 1928, in the District Court of Jaffa by the respondent who was the widower of one Fatmeh Mohamad el Hinnawi, against the appellant, as the heir of Fatmeh, claiming payment of the said sum of £E4,000, which was alleged to be due to the respondent upon a promissory note, dated 7th November, 1926, and interest. The defence offered by the appellant, called his "statement of reply," was in substance (1) that the promissory note was not executed by the said Fatmeh, and (2) that there was no consideration for the note. On 18th March, 1928, the action was heard before the District Court of Jaffa, when it was dismissed on the grounds (1) that the promissory note was invalid, and (2) that in law the respondent was not entitled to establish that the deceased had made the note. On 21st May, 1928, the respondent appealed from the said judgment to the Supreme Court of Palestine. On 5th February, 1929, that Court unanimously allowed the appeal, and set aside the judgment of the District Court. They remitted the action to the District Court for comparison of the finger-prints on the promissory note with authenticated finger-prints of the deceased, and for hearing evidence with regard to the making of the note; and they further ordered that, in the event of the District Court being satisfied that the note was duly executed, the question whether consideration was given therefor or not should be taken into account and a fresh judgment given.

On 31st March, 1929, the case again came on for hearing before the District Court of Jaffa, when evidence and argument were duly heard. On 25th July, 1929, the District Court found in fact that the finger-print on the note was that of deceased Fatmeh, and they entered judgment for the respondent against the appellant for £E4,000 and costs. The District Court, however, [124] omitted to deal with the [124] question of whether consideration had been given for the note, as in the circumstances they were directed to do. On 3rd February, 1930, the appellant appealed from that judgment to the Supreme Court of Palestine. He pleaded *inter alia* that no consideration for the promissory note had been given, and pointed out